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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MASTERPIECE ACCESSORIES, INC.,	B207716
Plaintiff and Respondent,	(Los Angeles County
v.	Super. Ct. No. TC020095)
SAM SAHAB, et al.,	
Defendants and Appellants.	

APPEAL from a judgment of the Los Angeles County Superior Court, William P. Barry, Judge. Affirmed.

David Romley for Defendants and Appellants.

Meserve, Mumper & Hughes and Bernard A. Leckie for Plaintiff and Respondent.

INTRODUCTION

A money judgment was entered in the trial court following a bench trial. The judgment arose out of an auction at which defendant R. L. Spear Company, Inc. ("Spear") was the auctioneer. Respondent, Masterpiece Accessories, Inc. ("MAI") was the seller. Appellants, Sam Sahab and Prestige Parking, Inc., were the successful bidders. The successful bidders will be referred to collectively in this opinion as "Sahab" unless context requires otherwise. Appellants Sahab appeal the judgment against them maintaining reversible errors were committed in three respects as follows: 1. MAI prevented or hindered Sahab's performance of the contract by locking its premises and refusing to allow Sahab to take delivery of its goods; 2. MAI failed to mitigate its damages by failing to make any effort to re-sell the auctioned goods and then destroying them; and 3. The trial court awarded consequential damages not recoverable in a contractual claim. For the reasons hereafter stated, we affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

Nature of MAI's business.

MAI was in the manufacturing business. It manufactured ceramic lamps and other decorative items out of a leased factory location at 1201 W. Francisco St., Torrance, CA. Tom Koch ("Koch") was president of MAI. MAI occupied the premises under a written lease which expired on June 30, 2004. MAI was required to sign a new lease for five years if it desired to continue its business at the leased location. MAI had no desire to sign a new lease for five years and opted to dispose of all items in the leased premises by way of auction.

Auction agreement with Spear.

On June 14, 2004, Koch entered into a written auction agreement with Spear. The auction agreement consists of two pages and is dated on the first page with the date of June 10, 2004.

Auction Catalog circulated by MAI.

MAI circulated an auction catalog to potential buyers, indicating that the auction was to be conducted on June 24th, 2004, with a notice contained therein stating "All Items Must Be Removed by June 28th, 2004," and that the sale was to be conducted by Spear.

Notice to all buyers by MAI.

A notice to all buyers and to Spear was given by MAI president, Tom Koch, dated June 29, 2004, which stated as follows: "This serves as written notice to all buyers of Masterpiece Accessories pieces from auction. Please consider this formal notification that all items purchased by all buyers at the public auction of Masterpiece Accessories held on June 24, 2004 at 1201 W. Francisco must be removed no later than 5:00 P.M. June 29, 2004. This notice is final and not subject to negotiation. [¶] Any items not claimed and removed (picked up) by the buyers will be stored by the landlord. All storage costs and expenses will be charged by the landlord at the prevailing legal rate. [¶] I am the President of Masterpiece and no one is authorized to override the agreement[.]"

Auction sale activity.

The auction was conducted on June 24, 2004. Sahab was the successful bidder on numerous items. Sahab's bid was approximately $45,000. On June 28, 2004, Sahib appeared on the leased premises with truck and movers and began moving his goods at approximately 10:00 a.m. Koch estimates that Sahab made about eight trips to the premises on June 28 and June 29. At approximately 5:00 p.m. on June 29, 2004, Koch locked the door to the premises thereby preventing Sahab from removing any additional items. On the following day, June 30 at approximately 5:30 p.m., Koch informed Spear that Sahab could re-enter the premises to pick up his goods that night.

Removal of Sahab's remaining goods to storage.

Koch testified that he removed Sahab's remaining goods to two storage facilities for a period of eight months, incurring expenses of $25,600 at one storage location and $14,126 at the other storage location. Additionally, Koch testified that additional

expenses were incurred as follows: $248.75 for utilities, $50 for a fire inspection, $603.48 and $1,083.14 for insurance, $6,905.50 for trucks to move Sahab's goods, $1,733 for additional storage, $2,968.38 for moving equipment rental, $6,599.28 for packaging materials, $5,970.96 to have the goods destroyed following the eight months the goods were stored, and $378.41 for food for himself and two laborers.

MAI's action against Spear and Sahab.

The damages claimed by MAI, which were hotly denied by Spear and Sahab as hereafter set forth in this opinion, resulted in the filing of a complaint by MAI in the Los Angeles County Superior Court. MAI's First Amended Complaint was filed on August 7, 2006, and is the operative complaint in this action. The amended complaint will be referred to hereafter as the "FAC" unless context dictates otherwise. The FAC contained five causes of action as follows: "1. Breach of Written Contract; 2. Breach of Oral Contract; 3. Conversion; 4. Common Counts [and] 5. Negligence."

The first cause of action for Breach of Written Contract was against all defendants, with the exception of Sahab and Prestige, and generally alleged that Spear failed to comply with the auction agreement by failing to collect all sums due from the successful bidders and to insure that all property was removed from the premises so that MAI could make a timely exit from the premises and leave it in a suitable condition in avoidance of incurring additional charges to landlord under its lease which MAI was terminating. MAI claimed damages in excess of the jurisdiction of the court, plus interest thereon and consequential damages incurred in lease holdover expenses to landlord and storage expenses for extensive personal property sold at the auction and never "picked up."

The second cause of action was against all defendants, with the exception of Sahab and Prestige, in the form of a common count entitled "Open Book Account Stated" which in effect sought payment for goods sold pursuant to the auction agreement for which MAI had not been paid and should be paid according to proof.

The third cause of action was against all defendants, except Spear, alleging that Sahab and Prestige had purchased extensive personal property at the auction in excess of

$40,000, failed to timely pick up and remove their property from the premises and even though MAI extended defendants time to do so until June 30, 2004, defendants failed to do so. As a result MAI has not been paid for all of the property bought by sellers and the premises was not cleared thereby causing consequential damages to MAI for removal and storage of the remainder of Sahab's property according to proof, which includes lease holdover expenses paid to landlord.

The fourth cause of action is alleged against Sahab and Prestige for conversion based on the allegation that these named defendants took various items of MAI's personal property without paying for such personal property and refuses to return the items taken or to pay for them in spite of a demand from MAI to do so. MAI alleges it has suffered damages and will suffer further damages according to proof at time of trial.

The final and fifth cause of action is for negligence against all named defendants, except Sahab and Prestige. MAI maintains that Spear failed to exercise the care required of a licensed auctioneer by failing to adequately publicize the auction sale to insure that the personal property sold at the auction was timely removed from MAI's business premises and to collect sums due from the successful bidders as an ordinarily prudent auctioneer would do under similar circumstances. MAI claims that as a proximate cause of the negligence of Spear MAI has been damaged in an amount according to proof at time of trial.

General denial and affirmative defenses of Spear, Sahab and Prestige.

On October 23, 2006, Spear, Sahab and Prestige filed a "General Denial" containing 7 affirmative defenses. The first five affirmative defenses stated that all five causes of action pled by MAI failed to state facts sufficient to constitute any cause of action. The sixth affirmative defense states that if plaintiffs suffered any damages, such damages "were caused in whole or part by plaintiff's own comparative fault." The seventh affirmative defense states that each and every cause of action pled by plaintiffs is barred by the statute of limitation.

Bench trial.

The parties waived trial by jury and the matter was heard as a court trial on January 22, 23 and 28, 2008.

Testimony of Koch.

Koch's testimony is summarized in respondent's brief on appeal as follows: He was president of MAI and the premises lease was up on June 30, 2004; MAI did not desire to sign a new five year lease; MAI contacted Spear and entered into an Auction Agreement; Koch told Spear in a meeting prior to June 10, 2004, that he was required to vacate the premises and have it broom clean by the end of the day on June 30, 2004; He explained that two days, at least, were needed after everything was picked up so he could get everything out of the premises and make it clean so he would not incur holdover charges by the landlord; the reason for the pick up of the items at least two days before the end of the month would allow MAI to clear out the building; Spear told Koch that he would hold the auction on June 24, 2004, which was in fact the day of the auction; following identification of the auction catalog, consisting of six pages, the catalogue was received in evidence containing a provision that "all items must be removed by June 28, 2004; this notice dated June 29, 2004, was given to everyone who still had items in the building which at that time may have only been Sahab; Sahab made no effort to remove any items on the 24th of June or the 25th of June; Sahab was reminded in a conversation with Koch that a lot of merchandise was still in the building and needed to be removed; the items were breakable and needed to be packaged; MAI made arrangements for its employees to help in the process; trucks arrived on Monday, including a 53-foot trailer; Sahab began removing finished lamps with shades and finished accessories; the 53-foot trailer made eight trips between Monday and Tuesday; they stopped coming to get their stuff on Tuesday night which was June 29, 2004; the last time they showed up was from 7:00 p.m. until 9:00 p.m.; Koch was present until midnight on June 28, 2004; the business stayed open so that Sahab could continue packing and loading their trucks; Koch told Spear's employee, Spencer Duran ("Spencer"), that if he was going to stay open another

night that it was necessary for them to take the bisque (unfinished items) and take the finished goods after that; Koch made this statement because Sahab was taking all the good stuff and no bisque; the items that Sahab did not remove were taken to storage at a hangar in the airport; the amounts paid to store the items Sahab purchased but did not remove were $44,066.36, $6,905.50 and $2,968.68; other testimony was given concerning additional costs and expenses.

MAI was able to move out five days after the lease expired and was sued by the landlord causing MIA to pay $36,248.07.

Koch was told by Spencer he had to store the items; the items were retained for eight months when it became obvious that the items were not going to be picked up; it cost $5,970.96 to destroy the items and $378.48 for food for the laborers working with him; the "summary of Sales Activity at MASTERPIECE ACC. INC-6/24/04" was admitted into evidence and testimony relating thereto was given; the statement is attached to respondent's brief on appeal as exhibit "D"; a letter from counsel representing Spear, one David Romely, who also represented Sahab at the trial, was admitted into evidence; the letter is attached to respondent's brief on appeal as exhibit "E".

Testimony of Gary Rogers

Another bidder at the sale was Gary Rogers ("Rogers"); he relates that in order to bid he had to have certified funds, a bank guarantee or in his case an American Express card; Rogers was absolutely aware that the items had to be removed by June 28, 2004; Spear stated before the auction started that the items had to be removed by June 28, 2004; Rogers knew he had to remove the items he purchased by the 28th because of the catalog when he pre-qualified as a buyer.

Testimony of Spear

Spear knew Sahab before this auction because Sahab was a buyer at many auctions; Spear acknowledges receiving the $45,000 or so check from Sahab and could not recall if he negotiated the check; Spear was told that Sahab had stopped payment on the check; Spencer was an employee of Spear who tagged everything and designated lots;

on Monday, June 28th, Sahab took about one-third to one-half of the items; Spencer acknowledged receiving a document from Koch on June 29, 2004, at about 4:30 to 4:45 p.m.; Spencer received the check from Sahab on Monday but later handed it back to Sahab because Sahab said he was going to stop payment; Spencer did not ask Sahab what he was going to do with the goods he already received; nothing had been done to get the money or to get the goods back; Sahab had done business with Spear for five or six years and paid by check.

Trial judge's decision.

Before counsel argued, the trial judge made the following comments:

"But I think with regard to the oral contract that plaintiff did have an oral contract with Mr. Sahab and Prestige Parking, and that Mr. Sahab knew or should have known that June 28th was the drop-dead date, and that those goods should have been out of there by June 28th, and that if he couldn't do that he shouldn't have bid. The fact that he did bid and later tried to renegotiate a new deadline is his problem not the plaintiff's problem. The plaintiffs were willing to let him come in the next day, the 29th, after the deadline, but that was really I think at the sufferance of the plaintiff, and was not a waiver of the deadline. It seems from Mr. Sahab's testimony today that, in fact, right away on the 29th the issue of removing the goods was a problem, and that at the end of that day Mr. Koch did deliver an ultimatum that effectively denied access, but I think he had a right to do that. From the photographs that I've looked at, it was going to take a long time to get that stuff out, and he had given a deadline. The deadline had not been met by Mr. Sahab and Prestige Parking, so there's a breach.

"I think the time to get – now the obligation to get the materials and goods out is plaintiffs['']. I think what the plaintiff did in the circumstances was reasonable. I don't think it would have been expected for him to have 20 or 30 people finishing everything up in a day or two, which I guess was what Mr. Sahab was prepared to do. I think he did, therefore, move expeditiously to get the goods out. There was an argument made by the Defendants that Radley vs. Haxondale (phonetic) argument that these were into an area of

damages that are not contract damages, but I think under the circumstances where a deadline is given to move goods out so that someone can turn the premises over to a third-party pursuant to contractual obligations is the kind of damages that would flow from a breach of that contract to get the goods out on that date."

The trial court's oral statement of decision pertaining to liability on the third cause of action against Sahab can be condensed and summarized as follows:

Sahab did some cherry picking and took what they thought would be the best;

Both parties realized that what was left after the removal of items by Sahab was not worth the trouble and was more of a liability; and

The true value of the contract damage was $45,440.80 and the court rendered judgment on the oral contract in that amount and then considered the award of damages for labor, storage, equipment rental, destruction costs, waste removal, and other similar items; MAI had to move the material to another location in the hope that Sahab would come and get it.

The court rendered its judgment in favor of Spear on each cause of action and a judgment in favor of MAI on the third cause of action with respect to the breach of the oral contract against the Sabab defendants being both joint and several. Sahab prevailed on the fourth cause of action for conversion. The court determined that the true value of the contract damages was the sum offered by Sahab in the amount of $45,440.80 plus certain itemized damages set forth in the judgment. The total amount of the judgment was $124,705.11.

The judgment was signed and filed on February 20, 2008. Notice of entry was given on March 10, 2008. Sahab filed a timely notice of appeal on May 5, 2008.

DISCUSSION

We address each of the claims of reversible error urged by Sahab as set forth in the "Introduction" paragraph of this opinion.

A. MAI prevented or hindered Sahab's performance of the contract by locking its premises and refusing to allow Sahab to take delivery of its goods.

As respondent maintains in its brief on appeal, an appellate court presumes that the record contains evidence to sustain every finding of fact and the burden rests on the appellant to specify in its brief which findings are unsupported by the evidence or to demonstrate that there is no substantial evidence to support the findings by the trial court. (*Miller v. Hassen* (1960) 182 Cal.App.2d 370, 376-377; *Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271.) Respondent contends, and this court agrees, the appellants have failed to bring to this court's attention what specific findings are not supported by evidence in the record. In effect, the trial judge found that Sahab knew or should have known that June 28, 2004, was the "drop dead" date and the goods should have been removed by that time. The court specifically held that if Sahab could not have gotten the goods out of the premises by that time, he should not have bid. The court specifically held there was a breach by Sahab because the deadline had not been met. We find nothing in this record to support Sahab's assertion on appeal that MAI prevented or hindered Sahab's performance of the contract by locking its premises and refusing to allow Sahab to take delivery of its goods. The record on appeal is to the contrary. We find no merit in appellants' first contention on appeal.

B. MAI failed to mitigate its damages by failing to make any effort to re-sell the auctioned goods and then destroying them.

As indicated in respondent's brief on appeal, the trial court responded to Sahabs' mitigation of damages contention by stating "I think that in this kind of case it would have been unrealistic to expect the plaintiffs to attempt a sale of this material based on both sides, the way both sides treated it. No one was going to want it because it was going to be more trouble to move in terms of labor costs, disposable costs, waste hallage [sic] costs, and possibly also hazardous waste certifications. So it was for want of a better word an albatross around Masterpiece Accessories' neck."

MAI asserts, and this court agrees, that substantial evidence is contained in the record indicating that Sahab dragged his feet with the knowledge that all the items had to be removed by June 28, 2004, and did nothing on the date of the sale or the two days thereafter. Sahab then removed a substantial portion of the finished goods and cherry picked what he wanted. As respondent points out, MAI gave an additional day to remove the items to June 29th but after having done so Sahab indicated he was going to stop payment on his check. Spear's employee, Spencer, then returned the check to Sahab who kept all of the goods he had removed.

As respondent further notes, it is clear that an injured party is not precluded from recovery just because an injured party has made reasonable but unsuccessful efforts to avoid loss, citing *W.C. Cook & Co. v. White Truck & Transfer Co.* (1932) 124 Cal.App. 721, 727, *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 239 and *Dutra v. Cabral* (1947) 80 Cal.App.2d 114 as decisional authority. We find the principle to be well founded in the law.

Respondent further maintains there is no duty to mitigate in situations where it is impracticable to do so. Respondent correctly relies on well established decisional law for this principle, citing as authority *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 23, *Eubanks v. Milton G. Cooper & Son* (1945) 68 Cal.App.2d 366, 372, and *Jegen v. Berger* (1946) 77 Cal.App.2d 1, 11.

Respondent further asserts that whether an injured party acted reasonably is a question of fact, citing *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951, 955 as authority. We agree with this proposition as stated by respondent.

The record indicates MAI had to move the material to another location with the hope that Sahab would come and get it. We find the argument made by Sahab on the mitigation issue to have no merit and side steps or fails to address the findings made by the trial court.

C. The trial court awarded consequential damages not recoverable in a contractual claim.

Sahab's claim of error in his last contention deals with the classic problem presented in the historic case of *Hadley v. Baxendale* (1854) 9 Ex. 341, 156 Eng.Rep. 145, concerning the extent of damages recoverable in a breach of contract case. The issue in *Hadley* pertained to whether lost profits were recoverable in a breach of contract case when the breaching party was not made aware that Hadley's business could not operate without the manufacture and timely delivery of a mill shaft. In disallowing the recovery of damages for lost profits the court reasoned that the breaching party, Baxendale, was not made aware that Hadley's mill would be inoperable without timely delivery of the mill shaft. This is an over simplification of the holding of the English court some 150 years ago, but this common law principle has been incorporated into the law of California in emphasizing the difference between general and special damages. Both Sahab and MAI cite the decision of the California Supreme Court in *Lewis Jorge Const. Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960 but for different reasons. In an extensive unanimous opinion by Justice Kennard, the court went to great lengths to define the difference between general and special damages, with particular emphasis on the historical importance of the English court's decision in *Hadley v. Baxendale* and the lingering importance the 150-year-old decision continues to play in California law with respect to damages recoverable for breach of contract.

Sahab relies on *Lewis* in urging this court to reverse. Sahab maintains that our high court reversed the appellate court for finding that profits from future lost construction work was reasonably foreseeable when *Pomona* terminated the construction company for failure to timely complete a school construction contract. *Lewis* maintained that its bonding capacity was impaired when *Pomona* terminated the contract, which resulted in future lost profits on construction work in the amount of some $3 million dollars. Our high court held, among other reasons, that the contractor's lost profits were

not special damages because they were not actually foreseen or foreseeable as reasonably probable to result from the school district's breach.

Respondent, MAI, likewise addresses the *Lewis* decision, but primarily to draw a distinction between the facts in *Lewis* as contrasted with the facts in this case. Respondent states that the decision in *Lewis* deals with the potential loss of profits on future jobs that the contractor did not obtain because of bonding difficulties related to the contract with the school district. However, MAI urges that in this case the facts are that the trial court was faced with hard money out-of-pocket expenses which were actually paid by MAI. The court indicated, as pointed out by MAI, it would not have been expected for MAI to have 20 or 30 people finishing up everything in a day or two and that MAI did move expeditiously to get the goods out of the leased premises. The court indicated that under the circumstances where a deadline is given to move goods so that someone can turn the premises over to a third party pursuant to a contractual obligation that damages would flow from a breach of that contract to get the goods out on the specified date. MAI was diligent in pointing out in its briefing on appeal that the trial court limited recovery for storage time expenses to three months vice the eight months of storage expenses claimed by MAI. Additionally, the trial court did not include the holdover judgment granted in favor of the landlord in the amount of $36,284.07.

We agree with MAI's conclusion that the damages awarded were reasonably foreseeable and were the proximate result of the breach of contract by Sahab. MAI is correct in emphasizing that the trial court properly determined that the amount that will compensate MAI for all the detriment proximately caused in the ordinary course of things was in keeping with Civil Code section 3300, which states: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We find no merit in Sahab's argument that the trial court committed reversible error in awarding more than general damages. Sahab's ultimate contention is that reversible error occurred when the trial court failed to find that the proper measure of damages in this instance is what the buyer contemplates, or is deemed to have contemplated, in a typical sales transaction, that if he fails to pay for goods which are still in the possession of the seller, his exposure is the contract price less the amount for which the seller re-sells the goods.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**